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Via Email (commentletters@waterboards.ca.gov)
Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comments on State Water Resources Control Board's Water Quality Enforcement Policy

Dear Ms. Townsend:

On behalf of the Kings River Water Quality Coalition, which is a member of the Tulare Lake Water Quality Coalition, which administers the Irrigated Lands Regulatory Program in the Southern San Joaquin Valley, we submit these comments regarding the extensive re-write of the State Water Resources Control Board's Water Quality Enforcement Policy. We have reviewed and comment relative to the "Comparison Document".

Our initial observation is that this entire reform of the Board's Enforcement Policy is 1) extraordinarily extensive, 2) does not seem to be conformed to the realities of its application to widespread agricultural nonpoint source irrigation, and 3) does not seem to reflect the peculiarities of impacts of the possible lawfully applied nutrients to deep aquifer situations.

Follows are specific comments in those regards:

1. The total re-write of 40 pages of comparative regulatory text and 27 pages of pertinent appendices is troubling in general, and specifically so when considering the manifold possible applications to the new and still emerging Irrigated Lands Regulatory Program, and its yet to be fully implemented global expansion to groundwater.

2. We understand the merits of a progressive fine system predicated on graduated penalties based on the concept of reclaiming any "advantage" a violator may have gained by virtue of the violation. It, however, also seems that additional factors need to be considered. First, the ILRP is a new extensive and complex regulatory program with various interpretations and approaches being considered by each the agency, coalitions, grower groups, industry experts, and at the farm operation levels. These factors should be appropriately evaluated in the consideration of imposing proper penalties in an emerging program.

3. Many of the regulatory requirements which may be at issue in an enforcement scenario are "program/process" matters (i.e., submittal dates, data omissions, data calculations, etc.), which have no substantive connection in respect to farm management, irrigation release, or having any bearing on a surface water discharge, or the percolation of water to the aquifer. The policy should allow for distinction between paperwork and actual discharge violations.

4. Also unique to the ILRP is that the Central Valley covers some eight million irrigated acres, involving an untold hundreds of thousands of separate fields and perhaps a million surface discharge points, and something like 300 trillion or an infinite number of percolation sites. The Water Board recognized the need to authorize watershed coalitions to bear the enormity of this unparalleled regulatory responsibility. Consequently, the enforcement policy must provide guidance on what would be a proper division of responsibility between the coalitions and the actual discharger who is the direct target of most all of the enforcement actions. Further guidance should also be offered on how such "violations," if any, will be brought against farm dischargers and watershed coalitions, and how they would be evaluated through the new proposed nine step penalty calculation process, if it is applicable to water quality coalitions at all.

4. There seems to be some confusion as to the elimination of three pages (6-8) of regulations dealing with Class 2 and 3 violations, yet retaining the reference to Class 1 violations (page 6). This leads to confusion and begs clarity in respect to Class 2 violations. The summary document still refers to Class 2, however, in the document itself does not refer to Class 2 violations.

5. The reference to evaluating if one farm's violation may have "encouraged others" to violate is total speculation, and in the absence of some affirmative finding of a conspiracy, it would be improper. Also, if such evidence of conspiracy was produced, it would seem the violation would be treated as an intentional violation.

6. A. The provisions on pages 13, 14 and 15, suggesting increasing penalties based on toxicity, clean-up costs, and any impact on drinking water, are problematic for evaluating agricultural farm and irrigation practices, as discussed below.

1) The policy asserts that special increased penalties will be assessed in situations involving "toxicity" (pgs 14-16). This is an overly broad concept, and a particular problem when dealing with agriculture. In industrial, municipal, and most other discharge situations involving toxic releases to water are accidental, controllable and undesirable. In agriculture, however, toxic materials are necessarily and intentionally applied pursuant to federal and state law with the express purpose of being toxic to pests so as to produce food as part of the state's premier industry – agriculture. Consequently, using toxicity as a penalty measure for

agriculture must be exercised with some perspective and reservation. Toxicity is an intentional lawful application in agriculture, which is much different than chemicals in most water quality situations.

B. Another problematic factor is the cost or effort for clean-up. Most of the recently promulgated General Orders involving the ILRP are not yet finalized or fully implemented (i.e., still being developed and involved in appeals), and the new regulatory obligations now involve groundwater. It is well established that 1) the aquifers underlying the Central Valley are huge and 2) the percolation travel time for groundwater from surface irrigation to first encountering the aquifer will be several decades. Each of these factors presents major questions regarding linking any present calculation of a fine to what may influence a huge aquifer some 25 years hence. This would be speculative and is therefore unsupportable (pg. 19).

Further, there is not even any present speculation by agency or other experts as to what it may take to commence any clean-up of such major aquifers. Therefore, this "clean-up" factor cannot be utilized in agricultural percolation to aquifers.

C. Nitrate influences on groundwater, and thus impacting potential drinking water, presents a major problem with which the Kings Water Quality Coalition has been very engaged in cooperation with the local and state agencies and Environmental Justice groups. Therefore, we appreciate the issues surrounding these drinking water problems. We are very involved with the Alta Irrigation District and other efforts underway to provide temporary and semi-temporary replacement water while at the same time working through the CV-SALTS Program to work towards improving the aquifers. The use of nitrogen is necessary for plant growth (this is similar to discussions regarding toxicity in 6.A above), and the scope of the aquifer problem raises some of the same issues discussed in 6.B above. Therefore, the programs to deal with drinking water are still emerging, and will need to be considered when assigning penalties for drinking water impacts.

Consequently, each of these three factors needs to be reasonably evaluated in respect to their utilization in agricultural water situations.

7. The document indicates that penalty calculations will be determined by severity and that severity will be predicated based on gallons or days. (pgs. 18, 20) This penalty system seems to be based on a spill or release, whereas in agriculture we are dealing with major farm acreages, intentionally and lawfully applying necessary agricultural management tactics and tools, and merely percolating irrigation water. It is widely recognized by industry, university, and regulators alike that some, but likely decreasing, levels of nitrates will continue to percolate in the soil profile. It is also impossible to presently determine if and to what extent a practice will result in an influence to a large and deep aquifer many years in the future, and the quantity

of gallons will be equally both speculative and massive such that these specific factors will have to be modified and reasonably evaluated when utilized to assign penalties in the agricultural setting.

8. The proposed program would advance specific considerations for assigning penalties for discharges that affect Disadvantaged Communities (DAC) (pg. 39). As discussed above, specific consideration needs to be engaged when dealing with nitrate percolation to aquifers. The question then becomes how should any penalty be assessed for an incident which may have impact on a DAC. We do, however, support that the penalty assessed for impacting DACs may be directed to a compliance fund dedicated to providing remedy/relief to the DAC without being limited to 50%.

Sincerely,

William J. Thomas
for BEST BEST & KRIEGER LLP

WJT:lmg

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